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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JIMMY ROSE, Warden,

Petitioner,

—v.—

STANLEY BARHAM CLARK,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE, AMICI CURIAE, IN SUPPORT OF THE RESPONDENT

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INTEREST OF AMICI CURIAE*

The American Civil Liberties Union ("the ACLU") is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the rights secured to people of this country by the Constitution. The American Civil Liberties Union of Tennessee is one of its affiliates.

The ACLU has long worked to defend the rights of criminal defendants and has filed numerous briefs, both as counsel for a litigant and as amici curiae is cases involving the interpretation of federal constitutional provisions related to criminal cases.

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* The parties have consented to the filing of this brief amici curiae. Letters of consent are being lodged with the Court.

SUMMARY OF ARGUMENT

The single issue addressed by amici is whether a jury instruction that impermissibly shifts the burden of proof to the defendant on the issue of malice in a homicide case, in violation of this Court's interpretation of the Due Process Clause in Sandstrom v. Montana 442 U.S. 73 (1979), should be considered harmless error when the issue is properly preserved for review. Amici believe that this question must be answered in the negative.

As with other rights whose violation this Court has deemed harmful per se, the requirement that the prosecution prove the essential elements of the charge against the accused beyond a reasonable doubt is basic to an accused's right to a fair trial. For, like the right to counsel, the right to trial before an unbiased judge, the right to indictment and trial before a jury selected

without racial discrimination, and the prohibition against variance between the indictment and the proof offered at trial, the requirement that a judge accurately inform a jury that the prosecution must prove the essential elements of the crime alleged beyond a reasonable doubt is critical to the structural integrity of the criminal fact-finding process. The requirement that criminal charges be proven beyond a reasonable doubt is central to the presumption of innocence, to an accused's right to trial by jury, and to the maintenance of respect for our criminal justice system. Proceedings conducted in violation of such a fundamental precept must never be condoned.

Under the principles espoused by the petitioner and the Solicitor General, under which only innocence (or guilt) is relevant, the government could presumably simply

announce that "obviously" guilty defendants convicted, secure in the knowledge that, on habeas corpus, any violation of constitutional right would be deemed harmless beyond a reasonable doubt. But that is not, of course, the law. This Court has repeatedly and necessarily held some rights so vital to the system of justice we constitutionally maintain that they must be vindicated regardless of guilt. The right at issue here is such a right.

The Court may, however, decide this case on a narrower ground as it did in Francis v. Franklin, 85 L.Ed.2d 344 (1985). Even if a failure to inform a jury that it must utilize a reasonable doubt standard on each essential element of a criminal case could theoretically be treated as "harmless error", a determination that the constitutional error here was harmless beyond a reasonable doubt is impossible, since the evidence presented

on the issue of guilt was contradictory and equivocal, and the faulty presumption was particularly likely to interfere with fair consideration of respondent's insanity defense. Accordingly, the Court could affirm on that narrow ground, leaving for another day the overriding question whether Sandstrom error may ever be found harmless beyond a reasonable doubt.

ARGUMENT

I. A JURY INSTRUCTION THAT IMPERMISSIBLY SHIFTS TO THE DEFENDANT THE BURDEN OF PROOF ON THE ISSUE OF MALICE IN A HOMICIDE CASE SHOULD NEVER BE CONSIDERED HARMLESS ERROR.

In Chapman v. California, 386 U.S. 18, 23, 24 (1967), this Court recognized that "there are some constitutional rights so basic to a fair trial that their infraction could never be treated as harmless," and some that may be considered harmless if the beneficiary of the error "proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Like other rights whose violation this Court has deemed harmful per se,[1] the

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[1] The following constitutional errors have been held by this Court to be harmful per se: denial of the right to counsel, Holloway v. Arkansas, 435 U.S. 475, 488-89 (1978); use of coerced confessions, Chapman v. California, 386 U.S. at 23 n.8, citing Payne v. Tanoe, 356 U.S. 560, 568 (1958); variance between indictment and proof offered at trial, Stirone v. United States, 361 U.S. 212, 217 (1960); trial before an impartial judge, Tumey v. Ohio, 273 U.S. 310, 513 (1927); and trial before a racially untainted jury and grand jury, (cont'd next page)

requirement that the prosecution prove the essential elements of the charge against the accused beyond a reasonable doubt is "so basic to a fair trial" that its violation should never be deemed harmless.

The Court has considered violations of the right to counsel, to trial before an unbiased judge or a racially untainted jury, and to a lack of variance between an indictment and the proof offered at trial, to be harmful per se for two reasons.

First, these rights serve to protect the structural integrity of and respect for the trial fact-finding process by providing safeguards that reduce the probabilities of a person being convicted of a crime that he did not commit. For although an accused is not entitled to a "perfect trial," he is entitled to one in which his chances of being

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e.g., Vasquez v. Hillery, 54 U.S.L.W. 4068 (January 14, 1986). See generally Brief for the Solicitor General, Point A2 (collecting cases).

acquitted are not unfairly hampered by his being tried without counsel, or before a biased judge or a racially tainted jury, or on a charge different from that for which he was indicted.

Second, each of these guarantees serve to protect interests of crucial importance to both the defendant and the state that would be severely diminished, if their violation were held harmless. The rights secured by the Fifth and Sixth Amendments to the Constitution which comprise the essence of our adversial system of justice would be rendered meaningless if it were possible for a person to be arrested on one charge and then made to stand trial on a different charge without the benefit of notice or counsel, before a racially tainted jury, or before a judge who had a stake in the outcome of the proceeding. Whether or not the evidence against such a person were

overwhelming, such a proceeding would be so fundamentally at odds with our conception of due process of law that it could not be condoned, even if it reached the "right" result. The state may not establish guilt by flipping coins, or official pronouncement, secure in the knowledge that it can seek to prove guilt beyond a reasonable doubt on appellate or habeas review.

A criminal trial conducted under an impermissible burden of proof is similarly foreign to our conception of fundamental fairness.

A. THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT OF THE ESSENTIAL ELEMENTS OF THE CHARGE AGAINST THE ACCUSED IS ESSENTIAL TO THE MAINTENANCE OF THE INTEGRITY OF THE TRIAL FACT-FINDING PROCESS

It was not until this Court's decision in In re Winship, 397 U.S. 358 (1970) that the Due Process Clause was held to "protect the accused against conviction except upon proof beyond a reasonable doubt of every fact

necessary to constitute the crime charged." Id. at 365. As the Winship Court recognized, however, this requirement was already deeply rooted in our scheme of justice.[2] In re Winship, 397 U.S. at 362.[3] After reviewing

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[2] All the members of this Court in Winship except Justice Black agreed with the holding that proof of guilt beyond a reasonable doubt was required in criminal cases. Justice Harlan, in his concurring opinion, stated that "the requirement of proof beyond a reasonable doubt in a criminal case [is] bottommed as a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." Justice Harlan further noted that "[i]t is only because of the nearly complete and long-standing acceptance of the reasonable-doubt standard by the States in criminal trials that the Court has not before today had to hold explicitly that due process, as an expression of fundamental procedural fairness, requires a more stringent standard for criminal trials than for ordinary civil litigation." In re Winship, 377 U.S. at 372 (Harlan, J., concurring).

[3] Although one early commentator traced the reasonable doubt standard to the Irish Trials of 1798, Finney's Case, 26 How. St. Tr. 1019 (Ire. 1798) and Bond's Case, 27 How. St. Tr. 523 (Ire. 1798), see May, "Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases," 10 A.L.Rev. 642, 656-58 (1876), a more recent commentator has traced it back even earlier to the Boston Massacre Trials of 1770, Rex v. Wemms, reported in 3 Legal Papers of John Adams 93-314 (L.Wroth and H. Zobel eds. 1965). See Morano, "A Reexamination of the Development of the Reasonable (cont'd next page)

the decisions of this court in which it had

Doubt Rule, 53 B.U.L.Rev. 507, 515-19 (1975). Still other commentators have noted its deep roots in the cultural and religious precepts of various societies. See, e.g., Maimonides, Safer Ha Mitzvot, Negative Commandment 290, quoted in N.L.Rabinovich, Probability and Statistical Inference in Ancient and Medieval Jewish Literature 111 (1973). In explaining reasons for that Commandment's mandate that punishment not be carried out except upon the proof near certainty that the accused committed the act stated, Maimonides stated:

> 290 Commandment is the prohibition to carry out punishment on a high probability, even close to certainty. ... Do not think this law unjust. For among contingent things some are very likely, other possibilities are very remote, and yet others are intermediate. The "possible" is very wide. Had the Torah permitted punishment to be carried out when the possibility is very likely such that it is almost a necessity .... some might inflict punishment when the chances are somewhat more distant that that, and then when they are ever further still, until they would punish and execute people unjustly on slight probability according to the judge's imagination. Therefore, the almighty shut this door and commanded that no punishment be carried out except where there are witnesses who testify that the matter is establshed in certainty beyond any doubt, and moreover, it cannot be explained otherwise in any manner. If we do not punish on very strong

(cont'd next page)

been "assumed that proof of a criminal charge [was] constitutionally required", Justice Brennan explained the "cogent reasons" why "the 'reasonable-doubt' standard plays so vital a role in the American scheme of criminal procedure" and "is a prime instrument for the reducing the risk of conviction resting on factual error" (id. at 363):

> There is always in litigation a margin of error, representing error in fact-finding which both parties must take into account. Where one party has at stake an interest of transcending value-- as a criminal defendant his liberty--this margin of error is reduced as

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> probabilities, nothing can happen other than that a sinner be freed; but if punishment be done on probability and opinion it is possible that one day we might kill an innocent man -- and it is better and more desirable to free a thousand sinners, than ever to kill one innocent.

See also Justinian, Digest, 48. (collected in G.S.P. Scott, The Civil Law 110 (1932).

> to him by the process of placing on the other party the burden of ... persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt. ... To this end, the reasonable-doubt standard is indispensible for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'

397 U.S. at 364 (citations omitted).

Thus, as this Court recognized in Winship, it is not only the accused who has an interest in his conviction resting on proof beyond a reasonable, but also the community at large and the prosecution:

> ... [U]se of the reasonable doubt standard is indispensible to commanding the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs

> have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty.

Id. See also Underwood, "The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases", 86 Yale L.J. 1299 (1977).

In subsequent cases discussing the reasonable doubt standard, this Court has not departed from either Winship's definition of the reasonable-doubt requirement or its understanding of the high purpose that it serves. See, e.g., Ivan v. City of New York, 407 U.S. 203 (1972); Lego v. Twomey, 404 U.S. 477 (1972); Mullaney v. Wilbur, 421 U.S. 684 (1975); Hankerson v. North Carolina, 432 U.S. 233 (1977); Patterson v. New York, 432 U.S. 197 (1977); Sandstrom v. Montana, supra; Ulster County Court v. Allen, 442 U.S. 140 (1979); Connecticut v. Johnson, 460 U.S. 73 (1983); Reed v. Ross, 82 L.Ed.2d 1 (1984); Francis v. Franklin, 85 L.Ed.2d 344 (1985).

Thus, in Francis v. Franklin, supra, the Court noted that Sandstrom "made clear that the Due Process Clause of the Fourteenth Amendment prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden enunciated in Winship on the critical question of intent in a criminal prosecution." Francis v. Franklin, 85 L.Ed.2d at 361.

B. THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT OF THE ESSENTIAL ELEMENTS OF THE CHARGE AGAINST THE ACCUSED SERVES TO PROTECT INTERESTS OF VITAL IMPORTANCE TO OUR SYSTEM OF JUSTICE

Several interests crucial to an accused's right to fair trial are protected by the requirement that the prosecution prove the essential elements of the charge against the accused beyond a reasonable doubt.

First, this requirement is essential to the maintenance of the presumption of innocence in a criminal case. Indeed, as Justice Brennan stated in Winship, the

reasonable-doubt standard "provides concrete substance for the presumption of innocence -- that bedrock 'axiomatic and elementary' principal whose 'enforcement lies at the foundation of the adminsitration of our criminal law.' In re Winship, supra, 397 U.S. at 363, quoting Coffin v. United States, 156 U.S. 432, 453 (1895). See also Estelle v. Williams, 425 U.S. 501, 503 (1976) (the "presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial, under our system of criminal justice"); Taylor v. Kentucky, 436 U.S. 478 (1978).

Second, the requirement that the prosecution prove beyond a reasonable doubt the existence of every element of the offense charged against the accused is essential to the right to a jury trial, a right held by this Court to be "fundamental to the American scheme of justice," Duncan v. Louisiana, 391

U.S. 145, 149 (1968).[4] An accused's right to a jury trial entitles him not merely to a certain number of jurors drawn from a cross-section of the community, but to "a fair trial by a panel of impartial, 'indifferent', jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). See also Turner v. Louisiana, 379 U.S. 466 (1965). To say that an accused can still obtain a "fair jury trial" even though the jury is improperly instructed as to the burden of proof to be applied on an essential element of the charge against him is to exalt form over substance, irrationality over reason. See, e.g., Jackson v. Virginia, 443 U.S. 307, 317 (1979) ("The Winship doctrine requires more than simply a trial ritual. A

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[4] So important was the right to a jury trial to the Framers that it was stated not once but twice in the Constitution. Article III, Section 2 provides that "the trial of all crimes, except in case of impeachment, shall be by jury." The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

doctrine establishing so fundamental a substantive constitutional standard must also require that the fact finder will rationally apply that standard to the facts in evidence. A 'reasonable doubt' at a minimum, is one based upon 'reason.'") Id. at 317.

Further, the reasonable-doubt standard serves to protect the distinction between the role of the judge and the jury in a criminal trial and to prevent the judge from directing a verdict against the accused. See, e.g., Connecticut v. Johnson, supra, 460 U.S. at 84; see also United States v. Martin Linen Supply Co., 430 U.S. 564 (1977); United Brotherhood of Carpenters v. United States, 330 U.S. 395 (1947); Bollenbach v. United States, 326 U.S. 607 (1946).

The State, as well as the accused, has an interest in ensuring that the Sixth Amendment right to a jury trial is preserved and protected. Cf. Singer v. United States,

380 U.S. 24, 36 (1955) ("Government, as a litigant has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result"); Patton v. United States, 281 U.S. 276 312 (1930) ("[The] maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions that before a waiver can become effective, the consent of the government counsel and the sanction of the Court must be had....")

Thus, in Rose v. Mitchell, 443 U.S. 545 (1979) and Vasquez v. Hillery, 54 U.S.L.W. 4068 (1986), this Court adopted a per se rule invalidating the convictions of persons indicted or convicted by a grand or petit jury whose members were selected in a racially discriminatory manner. As the Court noted in Rose and Vasquez, the strength of

the prosecution's case in such a setting is irrelevant to the structural imperative of assuring a jury trial untainted by racism. A trial before a jury tainted by racism is simply foreign to our concept of ordered justice. Similarly, a trial before a jury which has been misled as to its burden of proof obligation is inconsistent with our conception of a fair criminal process. Even if a racially tainted jury or a jury confused as to the burden of proof happens to reach the "right" result in a particular case, it cannot be treated as a legitimate exercise of governmental authority.

C. THE HARMLESS ERROR DOCTRINE, WHICH AFFORDS RELIEF FOR CONSTITUTIONAL ERROR UNLESS A REVIEWING COURT FINDS THAT THE ERROR COMPLAINED OF WAS HARMLESS BEYOND A REASONABLE DOUBT, IS NOT EQUIVALENT TO THE "CAUSE-AND-PREJUDICE" STANDARD APPLIED IN UNITED STATES V. FRADY, AND HAS NO APPLICATION HERE BECAUSE IT IS IMPOSSIBLE FOR A REVIEWING COURT TO DETERMINE THE EFFECT OF THE IMPROPER INSTRUCTION ON THE VERDICT

The harmless error doctrine permits a

reviewing court to ignore constitutional error on appeal only if it finds that the error complained of was harmless beyond a reasonable doubt. Chapman v. California. See also Milton v. Wainwright, 407 U.S. 371, 372 (1972); Schneble v. Florida, 405 U.S. 427, 428 (1972); Harrington v. California, 395 U.S. 250, 251 (1969). In order to make such a determination in a case such as this, the reviewing Court must be able to determine beyond a reasonable doubt that the jury's verdict was not the result of the Court's improper instruction but rather that it resulted solely from evidence presented in the case.

In a sleight of hand that attempts to cover over critical differences between the harmless error standard of Chapman and the prejudice prong of the cause and prejudice standard of Wainwright v. Sykes, 433 U.S. 72 (1977), the Solicitor General argues that

United States v. Frady, 456 U.S. 152 (1982) has already decided both 1) that a case-by-case assessment of whether Sandstrom error can be disregarded is required, and 2) that the standard for disregarding Sandstrom error is quite low. See generally Brief for the Solicitor General, Point B2. This Court's decisions make plain, however, that different interests are implicated in the two situations, and that the standards are far from equal. The issue here is not, as the Solicitor General's brief repeatedly assumes, whether the errors at defendant's trial "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension," which is the standard for determining whether a Sandstrom claim not raised below is nonetheless cognizable on habeas corpus. United States v. Frady, supra. Rather, the issue here is quite different: whether, the

defendant having timely objected at trial and properly raised the issue thereafter, the state has shown the error to be harmless beyond a reasonable doubt. Chapman, supra. It is, of course, one thing to say (as this Court said in Frady) that courts can determine prejudice, where a defendant has failed to timely raise and miss an objection to instructions, by assessing whether a defendant has shown "actual and substantial disadvantage infecting his entire trial with error of constitutional dimension," 456 U.S. at 170, and quite another to hold that courts can reliably find beyond a reasonable doubt that the Sandstrom error has not possibly affected the jury's decision. A defendant's burden of justifying federal collateral review where he failed to raise a claim is his state trial is quite irrelevant to the state's burden in Chapman. In short, Frady is quite inapposite here.

A Chapman determination in a case like the one now before the Court is simply impossible. As the Johnson plurality recognized:

> An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence. If the jury may have failed to consider the evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. The fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevent.

Connecticut v. Johnson, 460 U.S. at 86. See also Conway v. Anderson, 698 F.2d 282, 285 (6th Cir. 1983); Mason v. Balkon, 669 F.2d 222 (5th Cir. 1982).

Jurors in criminal cases, for the most part, are neither lawyers nor persons who have been trained in the law. Thus, it can not be presumed that the members of the jury

both understood the defective instruction but also knew the law well enough to know that it should be disregarded. See, e.g., McCormick, Evidence 965 (3rd Ed. 1984) ("One ventures the assertion that 'presumption' is the slipperiest member of the family of legal terms, except its first cousin, 'burden of proof'").

Finally, even if assuming that the harmless error determination could theoretically be made in some Sandstrom cases, this case, like Francis v. Franklin, supra, is not one in which it would result in reversal. The instruction was not only confusing but the evidence on the issue of guilt itself was contradictory. Given the close and intertwined connection in the juror's minds between the question of malice and the question of insanity, simply as a matter of common sense and understanding, the unconstitutional instruction that malice

could be presumed would inevitably and colorably affect the jury's consideration of that defense. At the least, it is impossible to say with confidence that such an untoward affect on fair consideration of the defense did not, beyond a reasonable doubt, take place. Nor is this likelihood affected, as the Solicitor General urged, by the fact that under Tennessee law the jury was to consider the insanity defense only after resolution of the malice issue. To the contrary, it is highly likely that a jury that had presumed malice, or ignored evidence against it, in conformity with the instructions, would be more than ordinarily inclined to reject an insanity defense as well.

CONCLUSION

For all the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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